

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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ZYBER SELIMAJ, individually and as
executor/administrator of the ESTATE OF
DESHIRA SELIMAJ and on behalf of his
minor children ALBAN SELIMAJ, AZBI
SELIMAJ, and ARBER SELIMAJ,,

Plaintiffs,

v.

CITY OF HENDERSON, an incorporated
municipality in the State of Nevada,
RICHARD PERKINS, in his capacity as Chief
of Police of the City of Henderson Police
Department, the COUNTY OF CLARK, a
county in the State of Nevada, and DAVID
ROGER, in his capacity as District Attorney
for the County of Clark,

Defendants.

02:08-CV-00441-LRH-LRL

ORDER

Before the court are Defendants' motion for judgment on the pleadings¹ (#18²) and
Plaintiffs' motion for leave to file an amended complaint (#24).

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¹Although Defendants label their motion as a "Motion to Dismiss Pursuant to FRCP 12(c)," the motion is actually a motion for judgment on the pleadings, as Defendants have answered Plaintiffs' complaint. *See* Fed. R. Civ. P. 12(c).

²Refers to the court's docket number

1 **I. Facts and Procedural History**

2 Plaintiffs—the estate of Deshira Selimaj, Zyber Selimaj, Alban Selimaj, Azbi Selimaj, and
3 Arber Selimaj—filed this action’s initial complaint in the Eighth Judicial District Court of Nevada
4 on April 4, 2008. That complaint seeks relief from Defendants City of Henderson, Richard
5 Perkins, Clark County, and David Roger under the Clark County Code § 2.12.080 *et seq.* and the
6 Due Process Clause of the Fourteenth Amendment.

7 After Defendants removed the case to this court, Plaintiffs moved for remand or, in the
8 alternative, issuance of a temporary restraining order requiring Defendants to provide documents
9 and information related to a coroner’s inquest that took place on April 10-11, 2008. This court
10 denied Plaintiffs’ motion in a April 9, 2008, order.

11 On June 13, 2008, Defendants moved for judgment on the pleadings, arguing that the
12 conclusion of the coroner’s inquest on April 11, 2008, mooted Plaintiffs’ case. On June 26, 2008,
13 Plaintiffs filed a motion for leave to file an amended complaint.

14 **II. Discussion**

15 An amended complaint will moot a motion for judgment on the pleadings when the
16 amended complaint cures any deficiencies in the previously filed complaint. *See* 6 Charles Alan
17 Wright et al., *Federal Practice and Procedure* § 1476, at 558 (2d ed. 1990). The court will
18 therefore address Plaintiffs’ motion to file an amended complaint as a threshold matter.

19 Federal Rule of Civil Procedure 15(a)(2) sets forth the standard a court must apply in
20 considering a motion to file an amended complaint that is not permitted as a matter of course: “[A]
21 party may amend its pleading only with the opposing party’s written consent or the court’s leave.
22 The court should freely give leave when justice so requires.” Here, Plaintiffs have not filed the
23 amended complaint as a matter of course and have not obtained Defendants’ consent to file the
24 amended complaint; therefore, this court must decide whether justice requires leave to file the
25 amended complaint.

1 In *Foman v. Davis*, the United States Supreme Court elaborated upon Rule 15(a)'s standard
2 for granting leave to file an amended complaint:

3 If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject
4 of relief, he ought to be afforded an opportunity to test his claim on the merits. In the
5 absence of any apparent or declared reason—such as undue delay, bad faith or dilatory
6 motive on the part of the movant, repeated failure to cure deficiencies by amendments
previously allowed, undue prejudice to the opposing party by virtue of allowance of the
amendment, futility of amendment, etc.—the leave sought should, as the rules require, be
'freely given.'

7 371 U.S. 178, 182 (1962).

8 In the present case, Defendants have shown none of the factors that would warrant denial of
9 Plaintiffs' motion to amend. Plaintiffs' motion for leave to amend was filed on June 26,
10 2008—only eighty-three days after the original complaint was filed in state court and before any
11 formal discovery. Moreover, Defendants have made no showing of bad faith or prejudice if this
12 court were to grant leave to file the amended complaint.

13 In opposition to the motion to amend, Defendants make three arguments, none of which
14 have merit. First, Defendants argue that Plaintiffs could have included the new allegations in the
15 original complaint, and therefore they should not be allowed to make the allegations now. The
16 court disagrees. Omission of the new allegations in the original complaint is excusable given that
17 Plaintiffs' were initially concerned with the coroner's inquest, which commenced seven days after
18 Plaintiffs' filed their complaint. Furthermore, after this court denied Plaintiffs' motion for a
19 preliminary injunction on April 9, 2008, Plaintiffs hired new counsel, who filed a notice of
20 substitution on June 17, 2008. Only nine days after this notice of substitution, Plaintiffs filed the
21 amended complaint.

22 Second, Defendants argue that the amended complaint's allegations are frivolous, and
23 therefore amendment would be futile. This argument is without merit. The amended complaint
24 alleges that an officer of the Henderson Police Department shot and killed Deshira Selimaj without
25 justification, giving rise to causes of action under the United States Constitution, the Nevada
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1 Constitution, and state tort law. These allegations are not frivolous.

2 Finally, Defendants argue that this court should deny leave to amend because the amended
3 complaint is a complete reworking of the original litigation. Again, this argument is without merit.
4 While pleading a new theory may have been disallowed at common law, no such restriction exists
5 in the Federal Rules, which reflect a policy of deciding cases on their merits. *See* 6 Charles Alan
6 Wright et al., *Federal Practice and Procedure* § 1471, at 502, 505-507 (2d ed. 1990)

7 IT IS THEREFORE ORDERED that Plaintiffs' Motion to Amend Complaint (#24) is
8 GRANTED.

9 IT IS FURTHER ORDERED that Defendants' motion for judgment on the pleadings (#18)
10 is DENIED as moot.

11 IT IS SO ORDERED.

12 DATED this 11th day of February, 2009.



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14 LARRY R. HICKS
15 UNITED STATES DISTRICT JUDGE
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